BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 74 to 77 of the record and is not yet reported.

II.

JURISDICTION.

The date of the judgment of the trial court is the 14th day of October, 1940 (R. p. 66). The date of the judgment of the Circuit Court of Appeals to be reviewed is April 8, 1942 (R. p. 77). The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code as amended February 13, 1925 (Chapter 229, Section 1), 43 Stat. 938; Section 1217 U. S. Compiled Statutes Cum. Supp. 1925, now being Section 347 (a), Title 28, U. S. C. A.

The cases believed to sustain the jurisdiction of this Court are:

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 82 Law. Ed. 1188;

West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179;

Klaxon Company v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020;

Six Companies of Cal. v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114, 61 S. Ct. 186.

III.

STATEMENT OF THE CASE.

In the petition, at pages 1 to 6, is a full statement of the case so far as the law and the facts are material to a consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that there was a question for jury as to whether petitioner exercised proper care for respondent's safety when it invited him to use the escalator, with its existing mechanical construction, without having attendants at the ends of the escalator to assist or give directions to respondent or person accompanying him as to the proper position to take on the escalator and the preserving of his balance and the avoiding of any effort to press forward as the escalator neared the second floor; and

2. In holding that where evidence suggested that other particular measures of protection might possibly be taken or that the evidence was such as to permit a sound doubt as to whether other reasonable measures were possible, there was a question for a jury as to whether or not infant had at all to be allowed to be exposed to the hazard.

V.

SUMMARY OF ARGUMENT.

1. The escalator in question was purchased from and installed by a manufacturer and was designed and constructed to accommodate adult persons, or such persons as petitioner, store owner, would reasonably contemplate entering the premises as business invitees. A store owner should not be expected to anticipate the presence of children of tender years in store, unaccompanied by parents or attendants. In supplying instrumentalities for the accommodation of business invitees and in carrying on business generally, the law does not require greater care of store owner to children than to others, unless the attrac-

tive nuisance doctrine is applicable. Store owner has right to assume that if a child incapable of anticipating, appreciating or guarding against danger, enters the premises in control of parent, that parent having custody and authority over child will prevent him from going into danger, which because of his immaturity he may not fully know and appreciate.

2. The escalator in question was not a complicated device. The parent accompanying respondent and exercising control over him was familiar with it and its movements and construction, and the danger to respondent from a fall upon it, if such child escaped from the mother's control, was as well known to the mother as to petitioner. Therefore, under Missouri law there was no obligation upon petitioner to warn her in regard to matters with which she was familiar and which were as well known to her as to petitioner.

3. Respondent's fall and resultant injury were not caused by any conduct upon the part of petitioner. The active, efficient and proximate cause of said fall and resultant injury was not the presence of respondent upon the escalator in question, but his escape from the control and care of his mother. Therefore, there was no right of recovery under Missouri law against petitioner.

4. The cases of Graves v. May Department Stores Company, 153 S. W. (2d) 778 (Mo. App.), and Jablonski v. May Department Stores Co., 153 S. W. (2d) 786 (Mo. App.), which the Court of Appeals said compel the holding in the case here, are distinguishable from the case here and furnish no authority for the opinion of the Circuit Court of Appeals.

ARGUMENT.

The evidence in this case shows that the escalator in question was purchased from, and installed by, a manufacturer and was designed and constructed to accommodate adult persons, or, it might be better said, such persons as the store owner would reasonably contemplate as business invitees. In this connection it might be well to point out that a store owner should not be expected to contemplate that children of tender years or of the age of respondent would come upon the premises unaccompanied by a parent or attendant. With this in mind, the duty of the store owner, in supplying escalators and similar instrumentalities for the accommodation of its business invitees and in carrying on its business generally, does not require greater care to children than others, unless the attractive nuisance doctrine is applicable.

In **Kelly v. Benas**, 217 Mo. 1, 116 S. W. 557, the Court said:

> "We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers to them, resting entirely on the fact that they are children. Those who have any special dealings with them, as parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection and the risk of injury. But those who have no such relations with them are not liable for negligence in carrying on their own business, beyond what would be their liablity to others, as well as children who are equally free from blame."

While we do not contend that any negligence on the part of the mother would be imputable to the child so as to

relieve petitioner from liability if it was negligent, we do contend that under Missouri decisions there is a recognition of the right of one in the position of petitioner in the case here to anticipate that the mother, who took respondent upon the escalator under the circumstances existing, would properly protect him against such risk of an injury as might be entailed if he should escape from her control and fall.

In **Gardner v. Turk**, 343 Mo. 899, l. c. 914, 123 S. W. (2d) 158, the Court said:

> "If, then, a child is not capable of anticipating, appreciating and of guarding against danger as would be a person of more mature years, judgment and experience, it would seem by parity of reasoning that those having custody and authority over such child and whose duty it is to care for and safeguard him should, so far as is reasonably possible, prevent him from going into a danger known to them, but which, because of his immaturity, he may not fully know and appreciate."

The escalator was not a complicated device, the width and height of the steps and the movements thereof, the height of the handrail, the width of the cleats and space between them, the comb-plate and apertures thereof, the width of the space between the teeth of the comb-plate through which the treads of the steps passed, were all visible, open and obvious; the movement of the steps, the fact that the distance between one and the other decreased as they neared the top, the fact that they leveled off before the treads passed between the teeth of the comb-plate, all were also visible, open and obvious. Respondent's mother, who took him upon the escalator, had used it upon numerous occasions prior to the accident, was familiar with it and knew of its works and workings. There is no evidence that the position of respondent and his mother upon the

step was not the proper position. Under these circumstances there was no obligation under the Missouri law to warn respondent's mother, who had the care and control of him, while upon the escalator. Therefore, there was no duty upon petitioner to warn or caution respondent, or his mother who accompanied him, as to the position to take while upon the escalator, or as to the preserving of his balance, or as to pressing forward as the escalator neared the second floor, as mentioned in the opinion of the Court of Appeals. Furthermore, the applicable Missouri decisions require no duty to warn of dangers which are open and obvious and which are as well known to the invitee as to the owner or occupant of the premises.

In the leading case of Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278, the duty of an owner of premises to those coming thereon at his invitation, using due care, is announced as follows:

> "The owner of lands is liable in damages to those coming thereon, using due care, at his invitation or inducement, express or implied, or on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises, which is known to him and not to them, and which he has suffered negligently to exist, and of which they have received no notice."

In the opinion in the same case, quoting from 20 Ruling Case Law 56, par. 52, it is said:

> "The mere ownership of land or buildings does not render one liable for injuries sustained by persons who have entered thereon or therein; the owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowl-

edge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. . . . And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant."

See, also:

Horvath v. Chestnut Street Realty Co. (St. L. C. of A.), 144 S. W. (2d) 165;
Paubel v. Hitz, 339 Mo. 274, 96 S. W. (2d) 369;
Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104;
Reddy v. Joseph Garavelli, Inc. (Mo. App.), 102 S. W. (2d) 734;
Murray v. D'Oench Co. (Mo. Sup.), 147 S. W. (2d) 623.

In the case of Murray v. D'Oench, supra, the Supreme Court of Missouri said:

"We have held that 'the true ground of liability (of an owner or occupant of lands to an invitee) is the proprietor's superior knowledge' of an unsafe condition and its dangers. * * * We have, therefore, ruled where the condition is so open and obvious that it is as apparent to the invitee as to the owner, or where the condition is actually known to the invitee, that there is no liability; otherwise the proprietor would be in effect an insurer."

Surely the dangers which might result from a fall if the child escaped from the mother's care and control were as well known to the mother as to the petitioner.

The evidence shows clearly that respondent's fall and resultant injury were not caused by any conduct on the part of petitioner nor on account of the method and manner of the operation of the escalator. The evidence upon

the cause is that which came from his mother; no other witness saw him fall; his mother's testimony was that she was holding him by the hand and went to put her other hand under his arm; she held onto his hand all the time; that he got away from her hold and fell forward, just as the escalator was nearing the top and when respondent was on the second step from the top. This testimony points to but one cause of the fall and resultant injury, and that was his escape from the control and care of his mother. That was the active, efficient and proximate cause. The mere fact that he was present upon the escalator in the care, custody and control of his mother was a remote cause. Therefore, there could be no recovery under the applicable law of Missouri.

> Annen v. Jackson, 340 Mo. 331, 100 S. W. (2d) 872;
> Petigo v. Roseberry, 340 Mo. 724, 102 S. W. (2d) 600;
> Rose v. Thompson, 346 Mo. 395, 141 S. W. (2d) 824.

The Court of Appeals in its opinion recognizes the cases of Graves v. May Department Stores Co. (Mo. App.), 153 S. W. (2d) 778, and Jablonski v. May Department Stores Co. (Mo. App.), 153 S. W. (2d) 786, as announcing a principle of law to support its holdings, for in the opinion the Court states that its conclusion is further compelled by the holding and implications in said cases which have been decided by the Missouri courts since the present case was tried in the District Court. The facts in the Graves and Jablonski cases are in no way comparable to those here. In the Graves case a child of tender years was in petitioner's store with his mother. The mother was busy making a purchase in one of the departments when the child wandered away and was attracted by, and lured to, the escalator. He saw a piece of paper bouncing around on the tread of the steps where it entered the comb-plate, stooped down, and, in some way, while tampering with the paper or the moving steps, caused his fingers to be

caught in an aperture and injured. There the child was not in the care and control of his mother while riding upon an escalator, as was the respondent here. There the Court said:

> "The real and final test of negligence or no negligence in this case is whether or not the escalator in question was an instrumentality attractive and dangerous to a child of tender years to such an extent that a reasonably prudent person, exercising ordinary care to keep his store and the facilities therein necessarily used by his invitees in a reasonably safe condition for their use, would have anticipated that a child of tender years might be attracted to the escalator and injured between the step and the comb plate, and in the exercise of such care would have provided a guard to protect the child from such injury."

While the attractive nuisance doctrine was not strictly applicable in that case because the child was not a trespasser and was not lured upon the premises by the instrumentality which was left unguarded, the applicable principles announced in the attractive nuisance doctrine were borrowed from that doctrine and applied to the child who was rightfully upon the premises, and, after being thereon, strayed away from his mother and then was attracted by, and lured to, the instrumentality which was not guarded.

The facts in the Jablonski case were practically identical to those in the Graves case, and while we concede that the principles announced in those cases are authority for submitting a question as to whether or not a store owner was negligent in not providing a guard or attendant to prevent unaccompanied children of tender years from getting on an escalator, there is certainly no principle announced in said decisions which would authorize a holding that there was a question of negligence presented for the consideration of a jury where a child was

taken upon an escalator by the parent and was under the exclusive care and control of the parent, and on account of escaping from such control and care fell and was injured.

If the opinion of the Court of Appeals is permitted to stand, it is petitioner's belief that it is not confined to an injury sustained on account of fingers getting into the apertures of the comb plate of an escalator, but the principles announced in the opinion are such as to authorize the submission of a case for the consideration of a jury whenever a child of tender years escapes from the control of its parent while on an escalator, elevator, open stairway, or passing through revolving doors and falls and suffers an injury such as a fracture of a skull, or any injury about the body, or a fracture of an arm or limb, and such principles are clearly not supported by the applicable Missouri law here brought to the Court's attention.

In Mann v. Pullian, 127 S. W. (2d), l. c. 426, 344 Mo. 543, it is said:

> " 'The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence.'
>
> "Can it be said that a reasonable person should have foreseen that some one might sustain an injury as plaintiff did in this case? We think not. If not, then respondent cannot be held liable under the law of negligence. * * *
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> " 'Negligence is not determined by what any one looking back after the accident sees should have been done, but by what the ordinarily careful man under the circumstances existing before the accident would foresee and deem should be done.' "

CONCLUSION.

Inasmuch as the said Court of Appeals has failed to follow the applicable Missouri decisions, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari and thereafter reviewing and reversing the judgment and decision of said Court of Appeals.

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